

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant has filed a number of workers compensation claims against respondent. A brief review of those claims is necessary. In Docket No. 1,046,114, a preliminary hearing was held on September 28, 2009, on claimant's allegation she injured her left shoulder in a fall at work on October 13, 2008. It was determined she failed to meet her burden of proof that she suffered accidental injury and further failed to provide timely notice and timely written claim. In Docket Nos. 1,047,497 and 1,047,776 a preliminary hearing was held on March 9, 2010, on claimant's allegation she injured her left shoulder in a fall at work on October 6, 2009. It was again determined she failed to meet her burden of proof that she either injured her left shoulder in the fall or during physical therapy after surgery on her right shoulder. Neither of the preliminary hearing orders were appealed to the Board.

As a result of claimant's October 6, 2009, work-related injury to her right shoulder, she underwent right shoulder surgery on December 22, 2009. Claimant received temporary total disability compensation while she was off work from December 2009 through April 18, 2010, due to right shoulder surgery. Claimant remained off work after the surgery until respondent contacted claimant on April 16, 2010, regarding an accommodated job for claimant to start on April 19, 2010. Claimant was still having problems with her right shoulder and was upset about having to return to any work other than her truck driving job, but she returned to work anyway.

Claimant was initially directed to wash the windows on respondent's office building. Claimant would take a brush that was 1.5 feet wide and dip it into a 5-gallon bucket of soap, scrub the windows, rinse it down with a garden hose and then climb a ladder in order to squeegee the windows. Claimant would physically have to reach above shoulder level with the brushes to scrub any dirt and cobwebs off of the windows. After washing windows for approximately 45 minutes, claimant left to attend a previously scheduled meeting with her attorney. Claimant was gone approximately 30 minutes.

When claimant returned she finished washing the windows and noted increased pain in her left shoulder. After completing the window washing, claimant was asked to sweep with a push broom the long driveway in order to remove the chat. A shovel was provided so that claimant could scoop the chat and throw it into a 30-gallon trash can. While shoveling chat claimant testified she heard a loud pop and had a sharp pain from her shoulder into her neck. Claimant testified:

Q. How long did you sweep the driveway?

A. About 15 minutes.

Q. And what happened during that 15 minutes?

A. When I was bending down scooping the shovel of chat and as I picked it up and raised it and I tilted it over to dump the chat into the trash can, I had a loud pop and

a sharp pain shoot up through my shoulder into my neck; and I dropped the shovel and I went in immediately and told Jodie that I can't do that, that my shoulder is killing me, and she said I would have to speak to Bob.¹

Jodie Bolt, respondent's office manager, testified that when claimant came in complaining of shoulder pain, she never stated it was her left shoulder. And Ms. Bolt assumed she was referring to her right shoulder. Ms. Bolt further testified that she prepared claimant's time card which noted claimant worked from 8 a.m until 8:45 a.m. And then from 9:30 a.m until 9:45 a.m.

Claimant sought medical treatment at Urgent Care with a primary complaint of lower back pain as well as left shoulder pain. The medical report contained a history of washing windows with her arms above her head and left shoulder pain due to a sudden onset.² The doctor prescribed some painkillers, took her off work and referred her to a specialist, Dr. Sean Jackson for her back complaints.

On the day of the alleged accident, claimant had a previously scheduled doctor's appointment with Dr. Rick Schoeling. She advised Dr. Schoeling that upon her return to work she was sweeping the driveway, washing windows and drying windows.³ Claimant reported an increase in her numbness and tingling in both hands up to the elbow, left shoulder pain and low back pain.

Scott Kunshek, respondent's operations manager, testified that claimant had restrictions when she returned to work on April 19, 2010. Mr. Kunshek testified that the work respondent provided was within claimant's restrictions. Claimant was restricted from lifting over 20 pounds with her right arm.

Dr. Edward Prostic examined claimant on May 18, 2010, at the request of claimant's attorney. Claimant provided a history of washing windows and shoveling chat which aggravated her left shoulder. Dr. Prostic opined claimant aggravated her preexisting left shoulder disease.

A preliminary hearing was held on February 25, 2011. The ALJ issued an order on February 28, 2011, referring claimant for an independent medical examination (IME) with Dr. Pat Do. The ALJ also issued an Order For Medical Treatment on February 28, 2011, which indicated that medical treatment might be ordered pending Dr. Do's IME report. The ALJ further found claimant suffered accidental injury arising out of and in the course of employment.

¹ P.H. Trans. (Feb. 25, 2011) at 12.

² Do Depo., Ex. 7.

³ *Id.*, Ex. 6.

Upon receipt of Dr. Do's IME report, claimant filed for a preliminary hearing requesting medical treatment recommended in the report. Respondent was granted the opportunity to depose Dr. Do, before the ALJ ruled upon the claimant's request for medical treatment. After reviewing Dr. Do's deposition and hearing arguments of counsel by telephone conference call, the ALJ entered the instant Order For Medical Treatment dated September 1, 2011.

It is clear from the record that claimant had alleged problems with her left shoulder as far back as 2008. She had also received treatment for her left shoulder. Claimant had previously testified she injured her left shoulder in accidents in 2008 and 2009 as well as aggravations during physical therapy after her right shoulder surgery in December 2009.

Before the alleged incident on April 19, 2010, claimant had seen Dr. Schoeling on March 17, 2010, with a complaint of a significant increase in left shoulder pain and received a steroid injection in her left shoulder. On April 9, 2010, claimant was examined by Dr. Prostic who noted claimant's left shoulder complaints and her treatment with Dr. Schoeling. Dr. Prostic specifically noted claimant had pain and popping of her left shoulder with pain almost circumferentially.

Initially, it must be noted that Dr. Do did not believe that he was to provide a causation opinion when he initially performed his court-ordered IME of claimant. Accordingly, he recited claimant's history of a popping in her shoulder at work on April 19, 2010, as the incident that aggravated her preexisting left shoulder condition. However, upon examination at his deposition, Dr. Do equivocated regarding the causation for claimant's left shoulder complaints. Dr. Do testified:

Q. Dr. Do, based upon the information that you've reviewed today, as well as the records you reviewed and the history you've taken from this patient, would you agree with me that whatever left shoulder problems this patient was having at the time of your April 6th, 2011, examination was not caused by, accelerated, aggravated or activated by an alleged April 19th, 2010, incident?

A. Yes.

Q. Would you agree with me, Doctor, that the cause of this patient's left shoulder problems as she presented to you on April 6th, 2011, was due to either two preexisting work-related injuries that she described and -- and/or including physical therapy due to her right shoulder following a December 22nd, 2009, surgical procedure?

A. Yes.

Q. Doctor, one final line of questioning. This patient was evaluated by Dr. Prostic again at the referral of Mr. Phalen on November 3, 2009, and that report should be contained within the exhibits. Do you see that as well?

A. Yes.

Q. And do you see at that time, Dr. Do, Dr. Prostin diagnosed the patient as having a partial thickness tear of the left shoulder supraspinatus tendon?

A. Yes.

Q. That's the rotator cuff, is it not?

A. Yes.

Q. And at that time, Dr. Prostin recommended what form of treatment because of that clinical diagnosis?

A. An MRI both shoulders to guide further treatment.

Q. Okay. That's consistent with your April 6th, 2011, examination and findings and recommendations.

A. Yes.

Q. In fact, it's identical, is it not?

A. Yes.

Q. Again, Doctor, based upon Dr. Prostin's evaluation of November 3, 2009, compared to your April 6th, 2011 evaluation, would you again agree with me that clinically there was no change in pathology of the left shoulder caused by anything that occurred on April 19th, 2010?

A. Probably nothing significant.⁴

But on cross-examination Dr. Do again stated that when he first examined claimant he did not think that he was to provide a causation opinion and he could not say whether there was a permanent aggravation. Dr. Do concluded that, at best, claimant sustained a temporary aggravation on April 19, 2010. But he would want to again review the records and discuss with claimant the facts of her case in order to formulate a causation opinion.

In the contemporaneous medical records the day of the alleged accident, the claimant did not provide a history of a popping and pain in her shoulder. Yet she testified that while shoveling she heard a pop in her shoulder accompanied by pain. Dr. Do agreed the medical records contain an inconsistent history of the onset of left shoulder pain. Before the alleged incident the claimant was complaining of popping in her left shoulder

⁴ Do Depo. at 28-30.

and receiving treatment consisting of steroid injections. Dr. Do agreed that his examination of claimant's left shoulder did not reveal any change in pathology from Dr. Prostic's November 3, 2009 findings. Based upon a review of the entire evidentiary record, this Board Member finds claimant suffered a temporary aggravation of her left shoulder condition which did not require any change in her medical treatment.

It should also be noted that claimant pled a single discrete trauma with a date of accident on April 19, 2010. And while Dr. Do attributed her left shoulder condition to her other ongoing workers compensation claims, he ultimately concluded that in this instance the discrete incident on April 19, 2010 only caused a temporary aggravation of her preexisting left shoulder condition which did not require additional treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 1, 2011, is modified to reflect claimant suffered a temporary aggravation of her preexisting left shoulder condition which returned to its baseline condition without need for additional medical treatment.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2010 Supp. 44-555c(k).